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PORNOGRAPHY AND PROSTITUTION

PROVINCIAL RESPONSE TO BADGLEY AND FRASER REPORTS

SASKATCHEWAN

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I. BADGLEY REPORT

Pornography and prostitution are unacceptable forms of social activity to the vast majority of Canadians. In the large part, these activities are unacceptable because they tend to dehumanize fundamental aspects of social interaction and to promote and to allow exploitation and victimization. Child sexual abuse is still another horrifying example of victimization in today's society. Distressingly, child sexual abuse appears to be a present reality for a great many Canadians. For instance, the Badgley Report, the Report of the Committee on Sexual Offences Against Children and Youth, released in August, 1984, estimated that fifty percent of all women and thirty percent of all men in Canada had been victims of sexual abuse and that eighty percent of these acts were perpetrated against persons under twenty-one years of age. Child sexual abuse is not a local or a regional problem, it is a problem of national proportions which calls for a national response.

Judging from the number of reports and editorials carried by Canadian News media in the past year, it appears that Canadian society is becoming

increasingly alarmed about the misuse of our children. Whether the answers to stopping child sexual abuse are to be found in the treatment of offenders, the education of our children, the control of pornography and prostitution, or better family support services is unclear, however, what is clear is the need to develop a strategy for dealing with these issues now and to halt the ever widening circle of abuse.

Many of the findings and recommendations contained in the Badgley Report relate to matters within provincial jurisdiction solely or relate to fields of federal jurisdiction which impact on provincial governments, especially in relation to the administration of justice.

In particular, the Report recommended changes to the Criminal Code, policing services, child protection services, health services, educational services and correctional services. While all provinces can develop individual approaches to the delivery of adequate services in the health, corrections, education, and child welfare policy areas, provincial agreement on targeted areas for service delivery development would facilitate a reduction of and an effective response to the present reality of child sexual abuse in Canada.

A. Office of The Commissioner:

The Badgley Report noted the inter-jurisdictional nature of the problem,

and recommended the establishment of the Office of the Commissioner which Office would report to the Prime Minister and would be responsible for coordinating and integrating the development of needed services.

This would be an office without power. The Office could not assure Provincial agreement or presume to direct Provincial action. While such an Office might assist the Provinces by providing another conduit for pursuing amendments to the criminal law, that is its only apparent benefit.

B. Areas of Provincial Jurisdiction:

It may be that no single mechanism can be developed that will deal with all the issues and recommendations brought forward in the Badgley Report because of the diversity of the areas studied and reported on in the Report. On a provincial and professional level, the concerns raised in the Badgley Report are inter-disciplinary, inter-departmental and inter-governmental. However, Saskatchewan's response to the Badgley Report, to date, has been to refer it to an inter-departmental committee of government officials for review. Linkage with similar committees in other provincial jurisdictions and at the federal level would present a workable option for the development of a uniform or coordinated Provincial response on issues which go beyond mere justice concerns and cross over provincial boundaries, such as:

a) the development of standard protocols for dealing with child abuse investigations;

b) the development of child abuse registrars which can be effectively used to trace and identify the abuser and the abused;

c) the development of educational programs which can be used to alert children to the danger of sexual abuse and the possibility of seeking protection from sexual abuse,

d) the need to study correctional services and programs in order to establish a program to treat offenders, and;

e) the development of standard national health reporting systems.

C. Changes to the Criminal Code and Law of Evidence:

The Badgley Report recommendations concerning Criminal Code amendments and evidence law changes do, however, raise issues of direct concern to the Provincial Attorneys General who have responsibility for the administration of justice within their jurisdictions.

For example the Report discusses the creation of a new offence dealing with "touching for a sexual purpose a young person in the genital or anal region" separate from the present assault offences. These recommendations clearly raise the issue of what Canadian society views to be the capacity of a child to consent to sexual activity. How do we protect our young people from victimization and exploitation?

The Badgley Report also suggested the creation of an offence to specifically deal with sexual involvement with a youth by a person in a "position of trust". The intent, of such a provision would be to signal that the abuse of a "position of trust" by a person such as a step-father, foster-father etc., is a serious matter and should be dealt with more harshly than abuse between non-related individuals.

These, and other criminal law and evidence law issues raised in the Badgley Report require serious consideration by all jursdictions as they significantly affect the administration of justice as well as the quality of life offered to children in Canada.

In particular, the Report recommended the abolition of the requirement of corroboration of "unsworn" children's evidence. Under the present law a child who gives unsworn evidence must be corroborated. However, even a young child wishing to give unsworn evidence must first satisfy the court of his ability to understand the duty to speak to truth and that he has sufficient intelligence to testify. Surely this is the same as the test for an adult giving evidence on affirmation. There is no apparent reason to place special restrictions on the use and reception of the evidence of children. Children should be allowed to give evidence on affirmation as can anyone else without the added requirement of corroboration.

II FRASER REPORT

A. Pornography

Saskatchewan's Position

Saskatchewan was one of the few provincial governments to make a formal presentation before the Fraser Committee when it held its hearings across the country in 1984. In its brief to the Committee, the Government of Saskatchewan made the following recommendations concerning pornography:

- the Criminal Code definition of obscenity should be changed to make it more specific, by spelling out certain kinds of materials that would be deemed obscene, thus taking those kinds of materials outside the scope of the "community standards" test;

- the "community standards" test may still be relevant for certain kinds of adult materials that fall into a more general category of obscenity; such materials would be prosecutable subject to a more flexible test than those in the first category;

- the requirement in Code s.159 that "crime, horror, cruelty and violence" be linked with sex in order to be obscene should be removed; if "degradation" is to become part of the definition, it should be included as one of the enumerated subjects rather than an additional element to be proved in each case;

- the relevant provisions of the Customs Act and Broadcasting Act should be strengthened and enforced to prohibit the importation of pornographic and obscene materials; and

- the ability of provincial and municipal governments to regulate the sale and display of adult materials should be clarified.

Fraser's Approach

Although not the same in all material respects, the approach to pornography recommended by the Fraser Committee was not unlike that put forward by Saskatchewan. Particularly in its recommendation of a "tiered" approach to pornographic

materials, and in its premise that the protection of children is of the utmost importance, the Fraser Report seems to favour the type of change recommended by the Saskatchewan Government.

Furthermore, the recognition in Fraser of the broad social harm occasioned by the prevalence of obscene materials in the community is to be commended. This represents a shift away from the traditional approach to obscenity as a threat to public morals due to its explicit sexual content towards a recognition of the threat to the dignity and equality of all human beings, and in particular women, occasioned by these materials. When obscenity is viewed in this manner, certain limits on fundamental freedoms designed to curb its proliferation can be justified.

Definition of Obscenity

The Fraser Committee recommended that the following categories of offences be substituted for the obscenity offence presently contained in the Criminal Code, s.159:

> Tier 1 - includes visual representations of persons under 18 years of age participating in explicit sexual conduct, material which advocates, encourages, condones or presents as normal the sexual abuse of children, and material produced in such a way that actual physical harm is caused to the persons depicted; this material attracts the most serious criminal sanctions and there are no defences based on artistic merit, or educational or scientific purposes;

Tier 2 - is labelled "sexually violent and degrading pornography" and includes material in which physical harm or abuse is represented in simulated depictions; this material is subject to less onerous criminal sanctions than Tier 1, and defences of genuine educational or scientific purpose, or artistic merit, are possible;

Tier 3 - includes "visual pornographic material" that does not fall into Tiers 1 and 2; this material would not be subject to criminal sanction except in the context of display, so that the only prohibitions would be against display of visual pornographic materials without a warning on the premises as to their nature, and against sale of such materials to persons under age 18.

It should be noted that the Fraser Committee's definition of three tiers of pornography, if implemented, would result in considerable liberalizing of the obscenity laws as presently interpreted by the Canadian courts. Tier 2 is defined by Fraser to include sexually violent behaviour, bestiality, incest and necrophilia. In Saskatchewan's view, the line between Tiers 1 and 2 should be drawn in a different way, so that even some simulated depictions of sexual violence and degradation would be subject to the most serious criminal sanctions and would not attract the defences of educational, scientific or artistic merit. It is difficult also to see why depictions of bestiality and necrophilia should not also be proscribed outright, without reference to any community standards test.

In our experience, there are very few instances where it would be possible to prove actual physical harm to the

participants. Many films and magazines depicting simulated sexual violence are equally repugnant and should be dealt with by the most serious criminal sanctions. In other words, Fraser's definition of a second tier of pornography does not go far enough in recognizing the essentially discriminatory character of violent pornography. Many of the kinds of materials that would fall within Tier 2 of Fraser's definition should be treated as Tier 1.

A second concern with the Fraser recommendations relates to their treatment of so-called "visual pornographic material" in Tier 3, which is prohibited only if displayed without a proper warning or made accessible to persons under 18. The definition of Tier 3 materials is drawn in such a way as to include all but the most offensive pornography: that depicting children, actual physical harm, sexually violent behaviour, bestiality, incest or necrophilia. In our view, much of the hard core pornography presently prohibited by the Code would, under Fraser's classification, fall to be dealt with in Tier 3 solely as a problem of display. For example, sexually explicit material which is "dehumanizing and degrading" (to use the terminology employed in a recent Alberta case, R. v. Wagner) should be dealt with in Tier 2 and be capable of prosecution for its content. In our view, the context of such material is all-important in determining whether it exceeds community standards. It should not necessarily be proscribed outright without any

available defences (as would Tier 1 material), but more stringent means should be available in the Criminal Code to deal with it than a mere display offence.

We therefore recommend a change to the classification of pornography proposed by Fraser to reflect the community's concerns over the violent and degrading nature of much of the pornography now available.

Provincial Regulation

In its brief to the Fraser Committee, the Saskatchewan Government recommended that the Criminal Code be amended to clarify the power of local governments to complement the criminal law by regulating the display and sale of sexually explicit and other adult materials. More recent developments under the Charter, s.15 and the judicial trend towards requiring uniformity in the application of criminal legislation across the country may have rendered this approach futile. Provincial governments are therefore left in a difficult position, given the lack of success of attempts to develop constitutionally protected by-laws for regulation of sale and display of pornographic materials.

Fraser recommended that provinces and municipalities should play a major role in regulation of visual pornographic representations that are not prohibited by the Criminal Code, through film classification, display by-laws and

other similar means. However, the Committee's proposal that display by-laws be pursued in conjunction with the new display offences in the Criminal Code does not assist in overcoming the constitutional problems that are increasingly being experienced with respect to municipalities that attempt to regulate adult materials.

Film and Video Classification

One area in which provincial regulation may successfully be pursued without infringing on the federal criminal law power is the area of film and video classification. Most provinces have some sort of classification scheme for films shown in public theatres. Only a few have moved to extend these schemes to the area of videotapes intended to be rented or sold for private viewing.

The Fraser Committee recommended the establishment of a system for review and classification for video recordings in each province rather than a national film and video review system. Earlier this year, Saskatchewan passed legislation (as yet unproclaimed) which would facilitate video classification. Efforts have just recently been announced aimed at reaching an interprovincial agreement on video classification. This is not to be regarded as an attempt at a national film classification scheme; rather it allows local standards to prevail where desired, while at the same time facilitating co-ordination between provinces and

minimizing the expense of duplicated efforts. Manitoba, Ontario and Saskatchewan are involved to date, and other provinces have been encouraged to participate.

Customs

Fraser recommended that the Criminal Code be amended to make it an offence to import into Canada pornographic material proscribed by the Code, i.e., material falling within Tiers 1 and 2. Although criticisms have been made above concerning the definitions of Tiers 1 and 2, it makes sense to tie the importation prohibitions to the Code definitions, whatever they may be.

Broadcasting and Communications

Fraser recommended that:

- its proposed amendments to the Code with respect to proscribed pornographic material should be incorporated by reference into CRTC Regulations with respect to all broadcast media;
- pay television regulations should be amended to conform with the regulations on free public radio and television broadcasting;
- Canada should take the initiative to open immediate discussions on the international regulation of both public broadcasting signals and private signals emanating from fixed satellite services.

In our view, these proposals should be endorsed.

B. Prostitution

Saskatchewan's Position

Saskatchewan's recommendations to the Fraser Committee were to:

- reject outright the options of "legalization" or decriminalization;
- strengthen those areas of the criminal law aimed at the public manifestations of prostitution;
- amend the soliciting provisions of the Criminal Code to overcome the "pressing or persistent" requirement;
- expand the definition of "public place" in the Code and make it clear that clients can be charged with soliciting;
- make it an offence to engage in prostitution with any person under 18 years of age.

Fraser's Recommendations

The Fraser Report recommended that the prostitution-related activities of both prostitutes and customers should be removed from the Criminal Code except insofar as they contravene non-prostitution-related Code provisions, and do not create a definable nuisance or nuisances. Any prostitution business which operates without contravening the Criminal Code should be subject to municipal regulation. The idea behind this proposal to decriminalize prostitution is to allow provinces or municipalities to establish schemes to regulate and/or license the activities of prostitutes. Of course, decriminaliztion of prostitution was not among the Saskatchewan Government's recommendations to the Fraser Committee. Indeed, we feel the proposal would amount to

an "institutionalization" of prostitution by the State - a recognition that it is a legitimate business the same as any other. As we stated in our brief to the Committee, we feel this would be strenuously opposed by the majority of Canadians, who regard prostitution as a socially undesirable activity.

Measures to Curb Street Soliciting

Last Spring, the federal government introduced legislation aimed at street soliciting. Bill C-49 has recently received second reading and, although not without its critics in the House of Commons, seems to be an appropriate interim measure for dealing with street soliciting pending a more thorough review of the laws on prostitution.

The proposed Bill would repeal the current soliciting section of the Code and replace it with a new s.195.1 which would make it an offence to stop or attempt to stop any motor vehicle, impede the flow of pedestrian or vehicular traffic, or stop or attempt to stop any person, in a public place for the purpose of engaging in prostitution or of obtaining the services of a prostitute. "Public place" is defined to include a motor vehicle.

Insofar as the Bill would enable police to control the nuisances caused by street soliciting, its speedy passage should be encouraged.

C. Children

One of the fundamental features of the Fraser Committee's recommendations was a concern for the protection of children, and a recognition that the special vulnerability of children to prostitution and pornography necessitates specific measures aimed solely at their protection. A more detailed discussion of provisions for the special protection of children is contained in the section on the Badgley Report. However, a few points should be mentioned in connection with Fraser.

Pornography

We would endorse the Fraser Committee's attempt to delineate a separate offence for the production, distribution or possession of child pornography and to place this prohibition in the most serious category of offences. However, we would question whether the definition of child pornography as "explicit sexual conduct" involving a person under 18 goes far enough to proscribe so-called "soft-core" material which depicts children not in overtly sexual activities but in a suggestive manner intended for erotic purposes. By current legal standards the latter material is generally considered to be obscene and illegal, while it would not necessarily be covered by the offences proposed by Fraser.

One of the major concerns of Canadian citizens regarding pornography of all types relates to its easy accessibility

to children. We would endorse the Fraser Committee's recommendation that an offence be created for selling visual pornographic materials to persons under age 18 or displaying those materials in such a way that they are accessible to persons under age 18.

Prostitution

Fraser makes a number of specific recommendations with respect to the use of children as prostitutes, including the creation of specific offences for engaging in prostitution with a person under 18, procuring a person under age 18 to engage in prostitution, and living off the avails of child prostitution. Unlike the Badgley Report, Fraser did not recommend that young prostitutes be subject to criminal sanction themselves for engaging in prostitution.

Notwithstanding our rejection of the major part of Fraser's recommendations for dealing with prostitution, we concur that these specific offences aimed at adults who are involved with prostitutes under age 18 are necessary. Indeed the creation of an offence for engaging in prostitution with a person under 18 was recommended by Saskatchewan in its brief to the Fraser Committee. Furthermore, since we favour retention of an offence for street soliciting, it would seem appropriate that young prostitutes can be charged with such an offence and dealt with as young offenders.

Evidence of Children

Both Fraser and Badgley recommend the abolition of the requirement for the unsworn evidence of a child to be corroborated. We would give cautious approval to this proposal, given that the unsworn, uncorroborated evidence of a child would still be subject to cross-examination and to a determination of its weight by the trier of fact. What Fraser proposes is the removal of artifical restraints that presently prevent many children from having an opportunity to testify in court and have their complaints dealt with by law.

The area of children's testimony is expanded upon in the section on the Badgley Report.

III PROPOSED PROVINCIAL RESPONSE

The federal government has indicated its intention to consult with interested groups and individuals across the country on the recommendations of the Badgley and Fraser Reports. It is proposed that, to the extent possible, a unified provincial response to the Reports' recommendations be communicated to the federal Minister of Justice. We would propose the following provincial position with respect to Badgley and Fraser.

A. Pornography

- that provinces endorse a redefinition of "obscenity" offences which would recognize that different categories of material should be dealt with differently by the Criminal Code;
- that the federal government be urged to adopt a categorization of obscenity offences that reflects the essentially discriminatory character of much pornography and that treats violent and degrading material in a more serious manner than recommended by Fraser;
- that the role of provincial and municipal governments to regulate the sale and display of adult materials be explored and clarified;
- that the Fraser Committee's recommendations for change to the customs and broadcasting laws be endorsed;
- that schemes for classification of video cassettes be pursued.

B. Prostitution

- that provinces reject Fraser's recommendations for removal of prostitution-related activities from the Criminal Code and for the regulation and licensing of the activities of prostitutes by provinces or municipalities;

- *that provinces endorse a strengthening of Criminal Code* sections aimed at the public manifestations of prostitution and, in particular, a change to the "soliciting" offence which would make it more enforceable.

C. Children

- that provinces endorse the creation of offences for engaging in, procuring, and living off the avails of, the prostitution of a person under age 18;

- that provinces endorse the creation of an offence for sale of pornography to persons under 18 or display of materials in such a way that they are accessible to persons under 18;

- that provinces endorse the creation of specific offences relating to the production, distribution and possession of child pornography, but favour a definition of child pornography that extends beyond explicit sexual conduct;

- that provinces reject the recommendations of the Badgley Report suggesting the establishment of an Office of the Commissioner as this would create a potential intrusion into areas of provincial jurisdiction;

- that provinces support the establishment of a national front aimed at reducing the incidence of child abuse and at effectively responding to the needs of the abused and the abuser;

- that an interprovincial committee be established to link together provincial representatives and federal authorities for the purpose of attempting to target and co-ordinate a national response to child sexual abuse;

- that, as part of a national response to child sexual abuse, the changes proposed by the Badgley Report to the Criminal Code and the Laws of Evidence be studied by all jurisdictions and joint recommendations for change made to the federal government;

- that provinces request the federal government to give serious consideration to changing evidence laws to allow the uncorroborated testimony of a child to be admissible and to allow children to testify by affirmation.